Supreme Court, U.S.
FILED
JUL 22 2003
OFFICE OF THE CLERK

No. 02-1590

In The
# Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION and THE BLUE RIBBON COALITION, INC.,

*Petitioners,*

v.

GEORGE W. BUSH, President of the United States; THE WILDERNESS SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; SODA MOUNTAIN WILDERNESS COUNCIL; and NATIONAL WILDLIFE FEDERATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## REPLY BRIEF OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
S. AMANDA KOEHLER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
*Attorneys for Petitioners*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF OF PETITIONER ..... 1

I. MSLF'S COMPLAINT CONTAINED SUFFICIENT FACTUAL ALLEGATIONS TO PROVIDE "FAIR NOTICE" OF THE BASIS OF MSLF'S CLAIMS ..... 1

II. JUDICIAL REVIEW IS AVAILABLE TO ENFORCE THE LIMITATIONS ON PRESIDENTIAL AUTHORITY CONTAINED IN THE ANTIQUITIES ACT ..... 3

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

Page

CASES

*AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) ..... 5

*American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) ..... 4

*Associated Gen. Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519 (1983) .....2, 3

*Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).....4, 5

*Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).....4, 5, 6, 7

*Conley v. Gibson*, 355 U.S. 41 (1957)..... 2

*Dalton v. Specter*, 511 U.S. 462 (1994) ..... 6

*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).....3, 7

*Leedom v. Kyne*, 358 U.S. 184 (1958)..... 4

*Mountain States Legal Foundation, et al. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002).....1, 7

*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)..... 6

*Stark v. Wickard*, 321 U.S. 288 (1944)..... 4

*United States v. Burr*, 25 F. Cas. 187 (CC Va. 1807)..... 6

*United States v. George S. Bush & Co.*, 310 U.S. 371 (1940).....4, 5, 6

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).....1, 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES

16 U.S.C. § 431 ..... 2

19 U.S.C. § 1336 ..... 6

OTHER AUTHORITY

Executive Order No. 10340 (April 8, 1952) ..... 1

## REPLY BRIEF OF PETITIONERS[1]

### I. MSLF'S COMPLAINT CONTAINED SUFFICIENT FACTUAL ALLEGATIONS TO PROVIDE "FAIR NOTICE" OF THE BASIS OF MSLF'S CLAIMS.

Paragraphs 1, 36-80, Petitioners' Appendix (Pet. App.) 36, 44-50, of the complaint are factual allegations that set forth the bases of Mountain States Legal Foundation's (MSLF's) claims, describing in detail the presidential actions challenged as *ultra vires*. It is therefore untrue that MSLF "has failed to present any factual allegation sufficient to warrant review of its *ultra vires* claim." *Mountain States Legal Foundation, et al. v. Bush*, 306 F.3d 1132, 1133 (D.C. Cir. 2002), Pet. App. at 2; *see also*, Wilderness Society Opposition (Wilderness Opp.) at 16.

MSLF described in detail the presidential actions being challenged and stated that the President lacked authority for those actions – constitutional or statutory – thus stating a claim of *ultra vires* executive action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952); Complaint ¶¶ 36-104, Pet. App. 44-54. In *Youngstown*, as here, the text of the challenged Executive Order contained the purported authority for the presidential action. *Id.* at 584; *see* Executive Order No. 10340 (April 8, 1952). Nevertheless, as here, the plaintiffs' complaint simply charged that the President's action "was not authorized by an act of Congress or by any constitutional

---

[1] No publicly-held company holds a 10% or greater ownership interest in Mountain States Legal Foundation or Blue Ribbon Coalition, nor does either of these entities have parent companies.

provisions." *Id.* at 583. As here, the President responded, asserting various bases for his authority to issue the Executive Order. *Id.* at 584. Then, in the first round of briefing and thereafter, plaintiffs had the opportunity to set forth arguments demonstrating why the President's action did not fall within each of the asserted bases for authority. *Id.* Thereafter, the courts, including this Court, proceeded to consider whether the President's action fell within any of the asserted sources of authority. *Id.* at 585-589. Therefore, MSLF's complaint, just as did the complaint in *Youngstown*, stated an *ultra vires* claim that is properly subject to review by the courts.

Furthermore, MSLF's complaint was improperly dismissed by the D.C. Circuit for "fail[ure] to present any factual allegation sufficient to warrant review" because the issue regarding sufficiency of the pleadings under Fed. R. Civ. P. 8 is "fair notice." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Because MSLF alleged that the President's designation of each of the challenged monuments was "unconstitutional and *ultra vires*," Respondents clearly had "fair notice" that the President's authority for those actions was being challenged. Respondents did, in fact, receive "fair notice" because they promptly raised the Antiquities Act, 16 U.S.C. § 431, as authority for the challenged designations. Pres. Br. Mot. to Dismiss at 1; Interv. Br. Mot. to Dismiss at 1.

The Wilderness Society relies on *Associated Gen. Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983), for the proposition that the court cannot assume that defendants have violated the law in ways that have not been alleged. However, *Associated General* was not a "fair notice" case. Rather, the allegations in that case failed as a matter of standing and

antitrust law and the court could not assume any fact scenario different from the one alleged. *Id.* at 526-527, 545-546. But here, where the allegations do not fail on their face as a matter of substantive law, the issue is not whether MSLF could have alleged other facts sufficient to satisfy the substantive legal standards but whether Respondents received "fair notice" of the bases of MSLF's claims, which they clearly did. Moreover, because MSLF's claims were based on a lack of authority for the challenged actions, MSLF could not be expected to know at the outset the facts that would be necessary to rebut the President's asserted authority.

Because all parties had "fair notice" of the bases of MSLF's claims and the case proceeded accordingly, the D.C. Circuit's decision that the complaint failed to satisfy notice pleading standards is in conflict with decisions of this Court regarding notice pleading requirements.

This Court should grant the Petition to resolve this conflict.

## II. JUDICIAL REVIEW IS AVAILABLE TO ENFORCE THE LIMITATIONS ON PRESIDENTIAL AUTHORITY CONTAINED IN THE ANTIQUITIES ACT.

The President argues that MSLF is not entitled to judicial review of its *ultra vires* claims by mischaracterizing them as claims based on abuse of discretion. President's Opposition (Pres. Opp.) at 8. The Wilderness Society similarly attempts to draw a distinction between statutory and *ultra vires* claims, relying on *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), to mischaracterize MSLF's claims as "claim[s] of error in the exercise

of [delegated] power." Wilderness Opp. at 13-14. Moreover, by arguing that MSLF's claims are non-reviewable because presidential action may not be reviewed for abuse of discretion, Respondents ignore a key distinction between the type of judicial review prohibited in *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), and the type of judicial review permitted here.

When there are specific statutory limitations on executive authority, as in the Antiquities Act, this Court has held consistently that judicial review is available to ensure compliance with those limitations. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986); *Leedom v. Kyne*, 358 U.S. 184, 188-190 (1958); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902).

For example, in *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1322-1339 (D.C. Cir. 1996), the D.C. Circuit undertook review of President Clinton's Executive Order barring the federal government from contracting with employers who hire permanent replacement workers during a lawful strike, concluding that the President's Executive Order violated the National Labor Relations Act. The D.C. Circuit specifically refused to adopt the proposition, advanced by the President in that case and advanced by the President here, that the President's broad authority under the Procurement Act precluded judicial review of executive action for conformity with that statute. *Id.* at 1331. Rather, the D.C. Circuit held, based on *Bowen*, *McAnnulty*, *Stark*, and *Leedom*, that the broad discretion vested in the President by the Procurement Act does not preclude judicial review of presidential action for

conformity with that Act or with any other statute. *Id.* at 1327-1332.

Similarly, in *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (*en banc*), the D.C. Circuit substantively reviewed presidential action, concluding that President Carter's Executive Order denying government contracts to companies that fail or refuse to comply with voluntary wage and price standards was within the authority delegated by the Procurement Act. Though the Procurement Act vests broad discretion in the President to prescribe policies and directives "as he shall deem necessary to effectuate the provisions of the Act," the D.C. Circuit nevertheless examined the President's action to determine whether it, in fact, accomplished the statutory goals of "economy" and "efficiency." *Id.* (quoting 40 U.S.C. §§ 471, 486(a) (1986)). Therefore, even when the President is acting pursuant to a statute that grants broad discretion, the courts will not shirk their duty to demand that the President act in full compliance with the commands of the statute. *Reich*, 74 F.3d at 1330; *Bowen*, 476 U.S. at 681.

However, in *George S. Bush & Co.*, 310 U.S. at 380, the Tariff Act explicitly committed to the discretion of the President the judgment regarding the existence of facts necessitating presidential action.[2] The statute contained

---

[2] The Tariff Act of 1930 provided that the President:

> shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, *if in his judgment such rates of duty changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.*

(Continued on following page)

no objective standards with which any court could measure the President's compliance with the federal statute. *Id.* Thus, because Congress had committed the decision solely to the discretion of the President and had deprived the courts of any standard by which to review the President's decision, this Court held that it could not review the substance of the President's decision. *Id.*

*Dalton v. Specter*, 511 U.S. 462 (1994), is similarly distinguishable from this case. In *Dalton*, this Court refused to review the President's action under the Defense Base Closure and Realignment Act of 1990 because the Act did "not at all limit the President's discretion in approving or disapproving the Commission's recommendations" regarding challenged base closures. *Id.* at 476; *see also*, *Reich*, 74 F.3d at 1331 (distinguishing *Dalton*).[3]

---

*George S. Bush*, 310 U.S. at 376-377 (quoting 19 U.S.C. § 1336(c)) (emphasis added).

[3] The President argues that *certiorari* should be denied because judicial process is unavailable against the President. Pres. Opp. at 5-6. In *Dalton*, this Court expressed some hesitancy regarding non-statutory review of presidential action but declined to address the question, assuming "that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the [Administrative Procedure Act]." *Dalton*, 511 U.S. at 474. However, it is "settled law" that the Separation of Powers Doctrine does not bar every exercise of jurisdiction over the President; when judicial action is needed "to serve broad public interests," as here, "the exercise of jurisdiction has been held warranted." *Nixon v. Fitzgerald*, 457 U.S. 731, 753-754 (1982). Moreover, concerns about subjecting the President to judicial process are lessened when only declaratory and injunctive relief is sought regarding the President's nondiscretionary compliance with law. *See United States v. Burr*, 25 F. Cas. 187, 191, 196 (CC Va. 1807).

The D.C. Circuit correctly recognized that "*Reich* is instructive" regarding this case because "the same policy considerations apply," that is, because the Antiquities Act contains specific limitations on the President's authority under that Act.[4] *Mountain States*, 306 F.3d at 1136, App. 9. The President's compliance with these limitations is reviewable to determine whether the Antiquities Act may serve as valid authority for the President's designation of the challenged monuments. Accordingly, the President's argument that *certiorari* should be denied because MSLF's claims are unreviewable notwithstanding the sufficiency of the complaint fails.[5]

---

[4] The President also argues that MSLF has failed to provide a statutory waiver of sovereign immunity and cause of action permitting judicial review of the President's action. Pres. Opp. at 8-9; *see also*, Wilderness Opp. at 13-14. However, relying on *Larson*, the D.C. Circuit specifically rejected this argument in *Reich*, 74 F.3d at 1329, noting that "[a]lthough the government's brief advanced a breathtakingly broad claim of non-reviewability of presidential actions, the government does not seriously press its argument that we may not exercise jurisdiction over appellants' claim because they lack a cause of action or cannot point to a waiver of sovereign immunity." Sovereign immunity is not a bar to judicial review of MSLF's claims.

[5] Respondents raise the argument that the Antiquities Act is a constitutional delegation of legislative authority. Pres. Opp. at 6; Wilderness Opp. at 6-7. MSLF has not disputed that the Antiquities Act contains the requisite "intelligible principles" but rather has argued that, absent meaningful enforcement of those limitations on executive authority, the Antiquities Act would constitute an unlimited and, therefore, unconstitutional, delegation of congressional authority with respect to federal lands. Opening Brief on appeal at 25-28. Nevertheless, MSLF declined to petition for *writ of certiorari* on this issue because it did not form the basis of the D.C. Circuit's decision dismissing the complaint. Likewise, MSLF declined to petition this Court regarding use of the Antiquities Act to protect natural objects because

(Continued on following page)

This Court should grant the Petition.

## CONCLUSION

For all of the above reasons, this Court should grant the Petition.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
*Counsel of Record
S. AMANDA KOEHLER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

*Attorneys for Petitioners*

Dated: July 22, 2003

---

that issue did not form the basis of the D.C. Circuit's decision. *See* Pres. Opp. at 6-7; Wilderness Opp. at 8-12.